MT LEGISLATIVE HISTORY

Chapter 332 1983

Bill H _____ (S) 248 Original bill & hist. ___C

H. Committee on Judiciary S. Committee on Judiciary

| | | | | | |
|---|---|---|---|---|---|
| Hearing Date(s) | MAR 21 | ✓C | Hearing Date(s) | JAN 31 | ✓C |
| | _____ | ___C | | FEB 07 | ✓C |
| | _____ | ___C | | _____ | ___C |
| | _____ | ___C | | _____ | ___C |
| Date Out | MAR 21 | ✓C | | FEB 07 | ✓C |

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Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

STATUS SHEET

HOUSE JUDICIARY COMMITTEE

48TH Legislature

| Bill No. | Subject Matter | Date In | Sponsor | Hearing Date | Committee Action | Date Out |
|---|---|---|---|---|---|---|
| SB 225 | To extend the period of time following request for release in which a person voluntarily committed to a mental health facility may be detained, etc. | 2/28/83 | Sen. Daniels | 3/9/83 | Be Not Concurred In | 3/11/83 |
| SB 226 | Youth Courts, providing for party's moving for continuances, also in custodial situations | 2/4/83 | Sen. Crippen | 3/9/83 | Be Concurred In | 3/10/83 |
| SB 236 | Crime law, forfeiture, addressing to list of items creating rebuttable presumption; disposition of drug fines, etc. | 2/9/83 | Sen. Crippen | 3/9/83 | Be Concurred In | 3/9/83 |
| SB 237 | To provide a procedure for restitution to victims of crimes by the criminal offenders, etc. | 3/1/83 | Sen. Halligan | 3/21/83 | Be Concurred In As Amended | 3/22/83 |
| SB 248 | Revise laws relating to claim of mental disease or defect in criminal prosecution; allowing a county attorney, etc. | 3/1/83 | Sen. Towe | 3/21/83 | Be Concurred In | 3/21/83 |
| SB 260 | To extend laws relating to operation of motor vehicle while under influence of alcohol to roads and parking areas, etc. | 2/2/83 | Sen. Halligan | 3/11/83 | Be Concurred In As Amended | 3/22/83 |

Form CS-32
1-79

REPRESENTATIVE SPAETH wondered if they could put in language which says "who has voluntarily retired after eight years". SENATOR TOWE replied the reason for using the term "voluntarily" in the first place is because the person who is involuntarily retired after twelve years receives pension funds; those who voluntarily retire after twelve years do not; and, therefore, if a person who is involuntarily retired could be called back to active duty; whereas the person who voluntarily decides not to run again could not; and this doesn't make any sense. He explained that this does not depend on whether or not they are receiving retirement benefits. He noted that on page 2, line 17, it says that the daily salary is reduced by the retirement allowance, if any.

REPRESENTATIVE SPAETH aksed if he saw any problem with putting back in the language "voluntarily retires". He said one of his problems is that when a judge is involuntarily retired, the people have expressed their opinion as to whether they want him to sit on the bench or not. SENATOR TOWE replied that he does not have too much problem with that; he felt that they would lose some of the effectiveness they seek by limiting the number of people to which this would apply.

REPRESENTATIVE SPAETH commented that he did not know of anyone who has been involuntarily retired other than at the polls.

REPRESENTATIVE DAILY queried how many years does a judge have to work before he is qualified for a full retirement. SENATOR TOWE said that, off hand, he thought it was 65 or 20 years, whichever is earlier, except he has to serve eight years, but he was not sure.

There were no further questions and the hearing on this bill was closed.

SENATE BILL 248

SENATOR TOWE stated that this bill was originally proposed by Harold Hanser, County Attorney in Yellowstone County, and he raised some questions about insanity defense. He indicated that he was aghast to learn that even though

they had abolished the insanity defense, they are still, in some places, using the terms, "not guilty by reason of insanity". This bill generally revises the laws relating to a claim of mental disease or defect in criminal proceedings. He informed the committee of all the changes in this bill.

JOHN MAYNARD, Assistant Attorney General of the state of Montana, stated that the Attorney General supports this bill and he was here to answer any questions that the committee might have.

There were no further proponents and no opponents.

SENATOR TOWE closed by saying that the technical question was particularly critical; and if they don't pass that, they could have some other problems.

REPRESENTATIVE DAILY noted on page 3, line 11, wherein it says, "if the court finds that he is still unfit to proceed" and he wondered who determines if he becomes fit. SENATOR TOWE responded that the court must submit the individual to a medical examination by a professional person - a psychiatrist - who would examine the person and submit its report to the court; based on this report, the court must make a determination as to whether he is fit to proceed or not.

REPRESENTATIVE DAILY asked if he thought this was a pretty difficult thing to prove, i.e. if they had three psychiatrists, all three psychiatrists would all say something different. SENATOR TOWE replied that, in his opinion, that is exactly why they had the problems with the insanity defense; that is one of the reasons that he was not in favor of the insanity defense and supported abolishing that; there is no question but what psychiatrist can differ; if the defendant disagrees with the psychiatrist's report, the defendant can bring in another psychiatrist to try to prove something different; and that is why the court decides. He stated that he did not know of a better system.

REPRESENTATIVE DAILY asked if this bill passes, will more people be able to use the insanity defense in the state.

SENATOR TOWE replied that no, except for that technical correction on page 6, this bill does not speak to the insanity defense; they are talking about his fitness to proceed; this is different; they have to determine if the defendant is capable of participating in his own defense; and, if he is not, he cannot go to trial. He advised that this will not change the matter because by the supreme court decision, they have to do what this bill says anyway; they cannot decide that a man is not fit to proceed; send him to Warm Springs and then leave him there for the rest of his life. He continued that you have to pull him back in ninety days, have him examined again by a psychiatrist and then decide if he is really fit to proceed; if he is not fit to proceed and he is not likely to change, then he felt that it was only fair that they dismiss the criminal case; but you immediately start commitment proceedings, which will send him right back to Warm Springs, only then under the mental commitment proceedings and not under this nebulous unfit-to-proceed thing.

REPRESENTATIVE DAILY asked about the technical question on page 6, line 12, saying that he stated that a judge threw a case out of court because of a mistake that was made by the legislature, and it was codified correctly, but some sly defense counsel used it to have the decision reversed and to have the person released; and he wondered why would a judge do that. SENATOR TOWE replied that the question was not appealed, and had it been appealed, he was not sure whether the codification question would have stood or not. He noted that Harold Hanser just walked in and he was more familiar with this and requested that he be allowed to address this and also the insanity defense situation.

HAROLD HANSER, County Attorney for Yellowstone County, stated that he did not remember the exact circumstances, but there was a misprint in the statutes and this is to bring it back to where it should be.

REPRESENTATIVE DAILY commented that it does not make any sense that if everyone knew it was a mistake and yet some judge would set somebody free. MR. HANSER responded that

people have to execute the laws the way they are written and that is how this was written.

REPRESENTATIVE DAILY responded that he would agree with that, but that is the problem that people have with the judicial system; that it is wrong that they do that - it is obviously wrong.

SENATOR TOWE explained that they abolished the insanity defense in 1979; if this mental defect interferes with the ability to formulate an intent, it still may be a defense to prove all the elements of the defense.

MR. HANSER indicated that there are some real problems with the insanity defense; the way it is now it is very confusing; that he would encourage them to retain the Senate amendments, but he felt that they should have a subcommittee over the interim to study this entire issue and come up with some recommendations.

There were no further questions and the hearing on this bill was closed.

SENATOR TOWE indicated that REPRESENTATIVE ADDY will carry this bill on the floor of the House.

EXECUTIVE SESSION

SENATE BILL 381

REPRESENTATIVE KEYSER moved that they table this bill. The motion was seconded by REPRESENTATIVE SPAETH.

CHAIRMAN BROWN indicated that Senator Hager asked that they table that bill, which is the grandparent's visitation rights, pending dispostion of Representative McBride's bill, which he would prefer.

The motion carried with REPRESENTATIVE KEYSER voting no.

REGULAR SESSION

SENATE BILL 138

SENATOR MAZUREK explained this bill, which is an act to generally revise Montana's codification of the Uniform

REPRESENTATIVE SPAETH commented that he thought about that too, but no one really does that; they generally serve out their term and as a practice, he does not know of anybody who is retired under that provision and thinking back over the last ten or twelve years, he does not know of any judge that is in that particular situation.

The motion carried unanimously.

REPRESENTATIVE ADDY moved that the bill BE CONCURRED IN AS AMENDED. REPRESENTATIVE JENSEN seconded the motion. The motion carried unanimously.

SENATE BILL 248

REPRESENTATIVE DAILY moved that this bill BE CONCURRED IN. REPRESENTATIVE DARKO seconded the motion.

The motion passed with REPRESENTATIVE KEYSER, REPRESENTATIVE CURTISS, REPRESENTATIVE HANNAH and REPRESENTATIVE IVERSON voting no.

REPRESENTATIVE JAN BROWN noted that Harold Hanser brought up the matter of doing a study on the commitment law and she wondered if there was a bill in on this or should they do this as a committee.

REPRESENTATIVE IVERSON said that a resolution can be introduced up to the 90th day

CHAIRMAN BROWN noted that, as far as he knew, nobody has talked about it.

REPRESENTATIVE SPAETH felt that SB 347 or HB 888 has got to be reported out in order to have any sanity on our streams this summer. CHAIRMAN BROWN indicated that they would check HB 888 out and decide what they can do with SB 347 tomorrow morning.

CHAIRMAN BROWN indicated that they have SB 391 and SB 237, which deals with restitution and he wondered if they

# STANDING COMMITTEE REPORT

March 21, 19 83

MR. SPEAKER :

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 248

_____ reading copy (_____)
color

"AN ACT TO GENERALLY REVISE THE LAWS RELATING TO A CLAIM OF MENTAL DISEASE OR DEFECT IN CRIMINAL PROCEEDINGS; ~~PROVIDING FOR A VERDICT OF GUILTY BUT SUFFERING FROM A MENTAL DISEASE OR DEFECT AT THE TIME OF THE OFFENSE;~~ ALLOWING A COUNTY ATTORNEY TO RAISE THE ISSUE OF A CRIMINAL DEFENDANT'S LACK OF FITNESS TO PROCEED WITH TRIAL; PROVIDING FOR THE DISPOSITION OF THOSE DEFENDANTS FOUND UNFIT TO PROCEED; CORRECTING A REFERENCE IN PRIOR LEGISLATIOE DESCRIBING A MENTAL DISEASE OR DEFECT; AMENDING ~~SECTIONS 46-14-201,~~ SECTION 46-14-221, ~~AND 46-14-312,~~ MCA; ~~AMENDING~~ AND CHAPTER 713, SECTION 11, LAWS OF 1979; ~~REPEALING SECTIONS 46-14-102 AND 46-14-301 THROUGH 46-14-304,~~ MCA."

Respectfully report as follows: That SENATE Bill No. 248

BE CONCURRED IN

~~XXXXXX~~
~~XXXXXXX~~
~~XXXXXX~~

DAVE BROWN Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

PROPONENTS: Representative Addy, proponent of SB203, addressed the problems Yellowstone County is now facing. Under the redistricting proposal Carbon and Stillwater Counties will be assigned to the 6th Judicial District; however, people in these counties are strongly opposed to this proposal. They have requested that they continue to be attached to the 13th Judicial District. Regardless of whether they are or not, Yellowstone will still have a problem with long waits for court time. Representative Addy feels that SB203 would be an effective way to alleviate delays and HB471 would also be an effective pilot program to implement in Yellowstone County.

Judge Robert Wilson of the 13th Judicial District, voiced his support for both bills. He distributed graphs to the Committee which demonstrated the growth of Yellowstone County (Exhibit "A"). Also included with the graphs was a letter from Neil Keefer which addressed the problems Yellowstone County is now facing and their proposed ideas for dealing with these problems.

Harold Hanser, Yellowstone County Attorney, spoke as a proponent to both SB203 and HB471. It was his opinion that the redistricting proposal would not solve the court time problems in the 13th Judicial District immediately, but the enactment of SB203 and HB471 could. He stressed that the ability to utilize retired judges and the use of referees would be economical, effective and cost saving. He urged the Committee to give serious consideration to both of these proposals.

There being no further proponents, and no opponents, the hearing was opened to questions from the Committee.

Senator Mazurek asked Senator Towe how he felt about adding Stillwater and Carbon Counties back to Yellowstone. Senator Towe encouraged this and advised that since the addition of the new judge to the 13th Judicial District would not take place until 1985, these bills would give some immediate relief to Yellowstone County. Senator Berg asked if a Sunset Provision would be in order since these bills would be implemented on a trial basis. Senator Towe advised that it would not be advisable on SB203, but if there was a desire to add a provision of that nature before passing HB471, he would not object.

There being no further questions, the hearing was closed.

CONSIDERATION OF SENATE BILL 248: Senator Towe, sponsor of this bill, advised the Committee that it addresses the defense of mental disease and defect in a criminal case. This bill will "fine-tune" the 1979 legislation abolishing the insanity defense, by providing the defendant with three verdict options: guilty,

not guilty, and guilty but suffering from mental disease or defect. SB248 also sets out a procedure for disposition of a defendant who is unti to proceed with trial and it will correct a 1979 error making reference to a wrong section.

PROPONENTS: Harold Hanser, Yellowstone County Attorney, supported the need for this bill and elaborated on mental disease and defect. He stated that SB248 will come closer to reaching the problem the 1979 legislature set out to fix. He further explained that there is a need for a verdict if the legislature wishes a defendant to be sentenced. He stated that disposition of a defendant who is unfit to proceed may be settled too simplistically in this bill in that some may be highly dangerous and should not be discharged.

Nick Rotering of the Department of Institutions, supported the bill, especially how it clarifies the problem with individuals declared unfit to proceed. He did state, however, that the repealer cause him concern as it repeals the procedure for release of persons from Warm Springs. He questioned how people already committed would be able to gain their release.

John Maynard, Assistant Attorney General and proponent of the bill, spoke briefly about the insanity defense and distributed an article regarding it (Exhibit "B"). He stated that Montana was the first state to abolish this defense and went into detail about the state of mind necessary to commit certain crimes and the requisite intent which must be proved by the prosecutor. He expressed concern with Page 6, line 18 of the bill which would repeal Section 46-14-102. It was his opinion that this would abolish the key element of the insanity law as it now exists in Montana. He also had some concern with the language on page 2, line 6 and felt that the guilty, but insane verdict is unconstitutional. He fully supported the change on page 2, line 13 which allows the county attorney to raise the issue of fitness to proceed and he felt that page 3 clarified the procedural aspects of fitness to proceed. Page 4 also had a problem with its language in his opinion. He felt the amendments to page 5 excellently clarified the intent of the 1979 legislature. He urged the Committee to adopt the provisions which clarify the current law and to reject those which added uncertainty.

There being no further proponents, and no opponents, the hearing was opened to questions from the Committee.

Senator Mazurek requested a summar of the sections which John Maynard favors and those which he is against to be submitted

to the Committee in writing.

Senator Towe closed by agreeing with Nick Rotering about the need for a discharge provision on page 6, line 19 in order to handle the people currently committed to Warm Springs. This was an oversight on his part. He also acknowledged John Maynards' concers and admitted that the verdicts may be over-simplified as now drafted in the bill. He suggested this could be remedied by striking the added sentences on page 2 and reinstating the original wording. He also suggested the deletion of section 3 if page 2 was amended as he suggested.

There being no further questions from the Committee, the hearing was closed.

CONSIDERATION OF HOUSE BILL 27: Representative Koehnke, sponsor of this bill, advised that its intent is to amend the Uniform Commercial Code to provide that there are no implied warranties that seed for planting is disease free. He cited a problem with potatoes as being the cause for the drafting of this bill. It is his opinion that if a farmer is attempting fraud or is negligent, he should be held liable. However, some problems are unforeseen.

PROPONENTS: Mike Koehnke, a farmer from Townsend, testified in support of this bill. He stated that the seed growers are merely trying to accomplish the same thing as the Federal Warranty Act, by requesting the enactment of this legislation.

There being no further proponents, and no opponents, the hearing was opened to questions from the Committee.

Senator Hazelbaker stated that the key word here is "implied." Mike Koehnke acknowledged that this was correct. Senator Mazurek then questioned the differences between certified and uncertified seed and Koehnke advised it was a requirement that seeds pass inspection. He also informed the Committee that the Potatoe Association of America has acknowledged the need for this law.

There being no further questions, the hearing was closed.

CONSIDERATION OF SENATE BILL 201: Senator Turnage introduced this bill to the Committee at the request of Judge Douglas G. Harkin. He then read a letter supplied by Judge Harkin which explained the problems with the current Montana immunity

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Joseph Krovisky, Assistant Director
Public Information Office

Anne R. Voigt, Editor

U.S. Department of Justice
Washington, D.C. 20531

The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law of the Department of Justice. Use of funds for printing this periodical has been approved by the Director of Management and Budget through September 30, 1984. Expressions of opinion in articles do not necessarily represent the official views of the Department of Justice. The *News* would appreciate receiving copies of news releases, photos, reports, and books produced by members of the criminal justice community. All material submitted receives careful consideration, although it is not possible to publish every item in its entirety. Manuscripts will not be returned unless specifically requested.

## WHAT THEY ARE SAYING

# *Insanity Defense: Abolish In All But A Few Cases*

**The following is excerpted from testimony by Associate Attorney General Rudolph Giuliani before the House Judiciary Committee's Subcommittee on Criminal Justice.**

Although the insanity defense is raised in few federal cases and is successful in even fewer, the defense raises fundamental issues of criminal responsibility which the Congress should address. Moreover, the insanity defense is often asserted in cases of considerable notoriety, which influence the public's perception of the fairness and efficiency of the criminal justice process.

The Department of Justice has given this issue a great deal of thought over the past decade. In our view, the insanity defense should be abolished to the full extent permitted by the United States Constitution. Further, with respect to those few cases in which the defense cannot constitutionally be eliminated, the Congress should enact legislation permitting federal judges to order the commitment of dangerous, insane defendants.

Congress has never enacted legislation defining the insanity defense for the federal courts. Similarly, the Supreme Court has left the development of the defense to the various courts of appeals. As a result, even today, the federal circuits do not apply a wholly uniform standard, although in recent years all the circuits have adopted, with some variations, the formulation proposed by the American Law Institute's Model Penal Code.

Under the formulation now prevailing, a "person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform to the requirements of the law." In our view, this prevailing test contains two critical flaws. First, it introduces concepts of a defendant's motivation into the determination of guilt or innocence. Second, it permits the introduction at trial of massive amounts of conflicting and irrelevant testimony by psychiatric experts, thereby complicating the trial process and deflecting the attention of the jury from the critical issues.

Observers of the criminal justice system have long questioned whether mental disease or defect should excuse a defendant from criminal responsibility. Ordinarily, under our law, the reason or motivation for a criminal act is irrelevant, and provides no basis for exculpation. For example, a politically motivated killer may genuinely believe that his act was morally justified because the death of the victim would end injustice or lead to a better social order. Yet such a belief is clearly, and properly, irrelevant to his guilt or innocence. His motivation, if deemed to involve mitigating circumstances, would be taken into account by the judge at the time of sentencing.

There are four possible ways in which to modify the insanity defense. The first such approach would shift to the defendant the burden of proving that he was insane.

Placing the burden of proof on the defendant might alter the result in some cases. Certainly, this course of action would be constitutionally permissible, so long as it was not applied in any way to relieve the government of the burden of proving every essential element of the crime charged, including any required state of mind.

Nevertheless, this approach fails to narrow the scope of the defense. It would still permit the introduction of confusing psychiatric testimony on the defendant's moral capacity or ability to conform his conduct to the law. Instructions to the jury regarding "shifting" burdens of proof would further complicate the case for the jury. The

*(continued on page 8)*

## Defense Laws Changed

**Five states have created a new defense—guilty but mentally ill—in the wake of the trial of presidential attacker John Hinckley, according to the National Conference of State Legislatures. The five are New Mexico, Georgia, Delaware, Kentucky, and Alaska.**

**Twenty other states will consider changes in their insanity defense laws during their next legislative sessions. Hawaii is considering a bill that would shift the burden of proving insanity to the defendant, NCSL reports.** ■

# GRANTS

### NIJ

• $129,222 to the **National Center for State Courts**, Williamsburg, Virginia, to conduct a one-year study of the performance characteristics of different types of juvenile courts.

Investigators will sample cases from courts with differing organizational structures and assess whether variations in the statistics are the result of these differences or from idiosyncrasies in local court systems.

• $204,992 to the **National Council of Juvenile and Family Court Judges**, Reno, Nevada, to develop new courses and provide training on dealing with serious and violent juvenile offenders. The new curricula will help juvenile and family court judges become more familiar with practical programs for treating young delinquents and reintegrating them into the community.

### OJJDP

• $199,996 to the **National Council on Crime and Delinquency's Research Center** in San Francisco, California, to study the impact of court intervention on delinquent behavior and juvenile justice system costs.

The project will involve a comparison of the effects of long and short-term institutionalization, group home placement, probation, restitution, and other sanctions. ■

# *Limit Insanity Defense*

*(continued from page 2)*

insanity defense would still exist, and as such, would continue to permit or require the acquittal of persons who committed all the elements of the crime with which they were charged. In short, this change would make little practical difference and fails to resolve the basic problem of assuring justice and efficiency in the trial process.

A second approach is to permit the jury to return a verdict of "guilty but insane."

In our view, this approach raises serious constitutional concerns. The due process clause requires that the government prove every element of the offense, including the requisite mental state. This approach, however, would apparently permit a jury to convict a defendant even though he lacks the statutorily required mental state.

A verdict of guilty (but insane) would be permissible even in cases in which proof of knowledge or willfulness were lacking. Under these circumstances, we believe that this approach may well violate the Fifth and Fourteenth Amendments to the United States Constitution.

A third approach to modify the defense is to provide for a special verdict of "guilty but mentally ill." The Attorney General's Task Force on Violent Crime recommended this approach in its Final Report last year. A few states have recently enacted legislation to this effect. This approach does not alter the requirement that the government prove every essential element of the offense, including the required state of mind. Under the Task Force approach, a verdict of "guilty but mentally ill" could be returned only if the mental illness does not negate the defendant's ability to understand the unlawful nature of his conduct and does not negate his ability to conform his action to the requirements of the law.

This approach avoids constitutional problems and offers a jury an attractive alternative to the stark choice between conviction and acquittal. It does not, however, eliminate confusing psychiatric testimony concerning a wide range of issues not directly related to the mental element, such as delusions of a divine calling.

The final approach—and the approach we support—permits a jury to return a verdict of guilty, not guilty, or "not guilty *only* by reason of insanity." This last verdict may be returned *only* if the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense. Mental disease or defect would not otherwise constitute a defense.

This would abolish the insanity defense to the maximum extent permitted under the Constitution and would make mental illness a factor to be considered at the time of sentencing, just like any other mitigating factor. It would also, of course, eliminate the presentation at trial of the confusing psychiatric testimony on these issues.

One point must be added. The insanity defense can never be completely eliminated. Under any approach, the government will always be required to prove every element of the statutory offense charged, including any intent or knowledge required by the statute. Thus, in the rare case in which a defendant is so deranged that he could not form the statutorily required mental state, the government would fail to prove a required element and a conviction could not constitutionally be obtained.

However, under the approach we recommend, this rare case is the *only* one in which a defendant committing a criminal act could not be found guilty. Thus, our approach eliminates the defense as far as constitutionally permissible.

Finally, whatever approach the Congress takes, it should enact provisions for the civil commitment of defendants who are dangerously disturbed and who, for one reason or another, are not convicted. At present, outside the District of Columbia, there is no federal statute authorizing or compelling the commitment of an acquitted but presently dangerous and insane individual. The lack of such a commitment procedure in the federal system creates the very real potential that the public will not be adequately protected from a dangerously insane defendant who is acquitted at trial.

The Attorney General's Task Force on Violent Crime recommended last year that legislation be enacted "to establish a federal commitment procedure for persons found incompetent to stand trial or not guilty by reason of insanity in federal court." The Administration strongly supports the recommendation of the Task Force on Violent Crime that such commitment procedures be promptly enacted into law. ■

There being no further discussion, the hearing was closed.

ACTION ON SENATE BILL 26: Senator Mazurek explained the effective dates section of the bill. He then moved to amend SB26 in total as set forth in the "grey" copy. This motion passed unanimously. Senator Mazurek then moved that SB26 DO PASS AS AMENDED. This motion also passed unanimously.

FURTHER CONSIDERATION OF SENATE BILL 138: Senator Mazurek suggested taking out the provisions by which the Secretary of State's Office sets the fees for the Clerk and Recorders and also suggested putting back the sections which provide for buyer protection to farmers. Senator Turnage recommended taking out the non-uniform amendments referring to the Secretary of State's Office. The Committee felt that the UCC statutory filing fees should be left as they are since no problems have been relayed to them concerning the amount of this fee. Senator Mazurek then suggested that counsel work with Greg Petesch when preparing the amendments.

ACTION ON SENATE BILL 177: Counsel distributed amendments and reviewed them with the Committee. The critical language of the amendment was paragraph 4 which would limit the amount of wages subject to garnishment. This was discussed and the Committee felt that it was necessary to be consistent with federal law. Senator Crippen moved to adopt the amendments as proposed. This motion passed unanimously. Senator Crippen then moved SB177 DO PASS AS AMENDED. This motion passed with Senator Shaw voting in opposition.

ACTION ON SENATE BILL 248: Proposed amendments were distributed and explained by counsel. The main intent was to leave the prosecuting attorney with authority to raise the issue of fitness to proceed and to provide for disposition of those defendants found unfit to proceed. The Committee felt that John Maynard's concerns were being preserved and therefore Senator Berg moved to adopt the amendments as proposed. This motion passed unanimously. Senator Berg then moved SB248 DO PASS AS AMENDED. This motion carried with Senator Crippen voting in opposition.

ACTION ON SENATE BILL 290: Senator Berg drew attention to the fact that Section 13-35-202, as cited in the bill, should be amended to read Section "13-25-202" in the title and on page 2, line 4. This motion was then proposed and adopted unanimously. Senator Brown discussed the philosophy of election of representatives versus senators and stated we would be the only state in the country to adopt different election standards if this bill were passed. He then moved that SB290 DO NOT PASS. Senators Galt, Hazelbaker, Crippen and Shaw opposed the motion. Senator Brown withdrew his motion and Senator Shaw moved SB290 DO PASS AS AMENDED. This motion carried with Senators Brown, Halligan, Mazurek and Berg voting in opposition.

48th LEGISLATIVE SESSION

COMMITTEE ON SENATE JUDICIARY

| SENATE BILL NO. | ENTERED COMM. | DATE CONSIDERED | OUT OF COMM. | DO PASS DATE | DO NOT PASS DATE | DO PASS AS AMEND. DATE | BE CONCURRED IN DATE | BE CONC. IN AS AMENDED DATE | BE NOT CONCURRED IN DATE |
|---|---|---|---|---|---|---|---|---|---|
| 201 | 1-19-83 | 1-31-83 | 2-2-83 | 2-2-83 | | | | | |
| 203 | 1-19-83 | 1-31-83 | 2-15-83 | | | 2-15-83 | | | |
| 218 | 1-19-83 | 1-31-83 | 2-2-83 | 2-2-83 | | | | | |
| 220 | 1-19-83 | 2-1-83 | 2-2-83 | 2-2-83 | | | | | |
| 225 | 1-19-83 | 2-1-83 | 2-2-83 | 2-2-83 | | | | | |
| 225 | 2-7-83 | 2-10-83 | 2-15-83 | | | 2-15-83 | | | |
| 226 | 1-19-83 | 1-28-83 | 1-28-83 | | | | | | |
| 236 | 1-20-83 | 1-28-83 | 2-2-83 | | | 2-2-83 | | | |
| 237 | 1-20-83 | 2-1-83 | 2-7-83 | | | 2-9-83 | | | |
| 248 | 1-21-83 | 1-31-83 | 2-7-83 | | | 2-7-83 | | | |
| 260 | 1-24-83 | 1-27-83 | 1-27-83 | 1-27-83 | | | | | |
| 261 | 2-10-83 | 2-14-83 | TABLED | | | | | | |
| 262 | 1-24-83 | 2-3-83 | TABLED | | | | | | |
| 290 | 1-26-83 | 2-3-83 | 2-7-83 | | | 2-7-83 | | | |
| 303 | 1-27-83 | 2-7-83 | TABLED | | | | | | |
| 313 | 1-28-83 | 2-4-83 | 2-17-83 | | | 2-17-83 | | | |

(Use Separate Sheet for Senate, House Bills, and Resolutions)

ROLL CALL

JUDICIARY COMMITTEE

48th LEGISLATIVE SESSION - - 1983 Date 1-31-83

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| Berg, Harry K. (D) | ✓ | | |
| Brown, Bob (R) | ✓ | | |
| Crippen, Bruce D. (R) | ✓ | | |
| Daniels, M. K. (D) | ✓ | | |
| Galt, Jack E. (R) | ✓ | | |
| Halligan, Mike (D) | ✓ | | |
| Hazelbaker, Frank W. (R) | ✓ | | |
| Mazurek, Joseph P. (D) | ✓ | | |
| Shaw, James N. (R) | ✓ | | |
| Turnage, Jean A. (R) | ✓ | | |
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DATE January 31, 1983

COMMITTEE ON Judiciary

BILL NO. HB27
SBs 201, 203, 218, 248

VISITOR'S REGISTER

| NAME | REPRESENTING | Check One: Support | Oppose |
|---|---|---|---|
| David L. Wagner | Missoula County Sheriff | X | |
| Raymond Worming | Missoula County Sheriff | X | |
| Curt Chisholm | DEPT INSTITUTIONS SB 248 | | |
| Vick Rotering | " " SB 248 | | |
| Joe O'Toole | MSLA Chamber HB27 Commerce | | |
| Fred Van Valkenburg | Senate Dist 30 SB 218 | X | |
| Mike Kochnke | Self | HB27 | |
| Mc Davis | LAWYER | | |
| Hon Gordon Wilson | 13th Judicial District | 203 | |
| Harold Hanser | Yellowstone County Atty | 203 298 | |
| Thomas E. Towe | | 203 248 | |
| Mary Kay Burgess | Self | X | |
| J.E. Wingerter | Ft. Peck Tribes | | |
| John Maynard | A.G. | 248 w/ amendments | |
| John Scully | Blackfeet Tribe Off | 218 | |

(Please leave prepared statement with Secretary)

EXHIBIT "C"
January 31, 1983

FOURTH JUDICIAL DISTRICT
MISSOULA RAVALLI LAKE
SANDERS AND MINERAL

STATE OF MONTANA

DEPARTMENT 4
COUNTY COURTHOUSE
MISSOULA, MONTANA

DOUGLAS G. HARKIN
JUDGE OF THE DISTRICT COURT

December 27, 1982

Senator J. A. Turnage
P. O. Box 450
Polson, MT 59860

Dear Senator Turnage:

I would like to bring to your attention a problem with the Montana immunity statute. Section 46-15-311 M.C.A. provides that either the prosecution or the defense may ask the district judge to compel a person to answer a question or produce evidence that may incriminate him. If the person is required to give testimony the person cannot be prosecuted for or on account of the transaction or thing about which he testified.

The Montana method of granting immunity is known as "transactional immunity". Under this form of statute, once the immunity is granted the witness cannot be prosecuted for any transaction about which his testimony is compelled [see Kelly v. Gilbert, 437 F. Supp. 201 (1976)]. The district court order to compel testimony has the effect of granting transactional immunity.

Under federal law, immunity from prosecution may be granted under the authority of 18 U.S.C. §6002, §6003. This form of immunity is commonly known as "use and derivative use" immunity and precludes the use of the compelled testimony and any evidence derived from such testimony.

The critical distinction between the Montana and federal immunity statutes is that the federal immunity statutes allow prosecution for a crime about which testimony was compelled; what is forbidden is the use of the actual testimony or evidence derived from the testimony. Montana law totally forbids prosecution for a crime about which the person has been forced to testify, even if there is evidence separate and apart from the actual testimony given by the person who was granted immunity.

By way of example, in a recent case immunity was granted to a witness so that the defendant could fully exercise his right of cross-examination. The witness, who was a good friend of the defendant, had been charged as an accomplice

EXHIBIT "C"
January 31, 1983



to a homicide and when he was forced to testify he denied any involvement but did testify about some facts of the crime so that there is little doubt that he did give enough testimony to invoke the "transactional immunity" of our statute. The prosecution claims to have enough independent evidence to go to trial without the use of any of his testimony but now the case can never be prosecuted.

The problem caused by our statute is that in order to provide a fair trial to one defendant it may be necessary to allow another defendant to escape prosecution even though there exists independent evidence of his guilt. Often it is necessary to grant immunity to one co-conspirator in order to catch another but that is a conscious choice of the prosecution; under our current Montana statute immunity can be manipulated in a manner never intended.

An immunity law similar to the federal law would accomplish all objectives required of an immunity statute. Your help in correcting this problem would be appreciated. Please feel free to call on me if I could be of any further assistance.

Sincerely,

Douglas G. Harkin
District Judge

DGH/kp

ROLL CALL

JUDICIARY COMMITTEE

48th LEGISLATIVE SESSION - - 1983 Date 3-18-83

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| Berg, Harry K. (D) | ✓ | | |
| Brown, Bob (R) | ✓ | | |
| Crippen, Bruce D. (R) | ✓ | | |
| Daniels, M. K. (D) | | | ✓ |
| Galt, Jack E. (R) | ✓ | | |
| Halligan, Mike (D) | ✓ | | |
| Hazelbaker, Frank W. (R) | ✓ | | |
| Mazurek, Joseph P. (D) | ✓ | | |
| Shaw, James N. (R) | ✓ | | |
| Turnage, Jean A. (R) | ✓ | | |
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Each day attach to minutes.

# STANDING COMMITTEE REPORT

February 7 19 83

MR. PRESIDENT

We, your committee on Judiciary

having had under consideration Senate Bill No. 248

Towe/Addy

Respectfully report as follows: That Senate Bill No. 248

introduced bill, be amended as follows:

1. Title, lines 6 through 8.
   Strike: "PROVIDING" through "OFFENSE;"
   Insert: "ALLOWING A COUNTY ATTORNEY TO RAISE THE ISSUE OF A CRIMINAL DEFENDANT'S LACK OF FITNESS TO PROCEED WITH TRIAL; PROVIDING FOR THE DISPOSITION OF THOSE DEFENDANTS FOUND UNFIT TO PROCEED; CORRECTING A REFERENCE IN PRIOR LEGISLATION DESCRIBING A MENTAL DISEASE OR DEFECT;"

2. Title, line 8.
   Strike: "SECTIONS 46-14-201,"
   Insert: "SECTION"
   Strike: "AND"

Continued on Page 2

And, as so amended,
DO PASS

JEAN A. TURNAGE, Chairman.

STATE PUB. CO.
Helena, Mont.

February 7, 19 83

3. Title, line 9.
Strike: "46-14-312,"

4. Title, line 9.
Strike: "; AMENDING"
Insert: "AND"

5. Title, lines 10 and 11.
Following: "1979"
Strike: the remainder of line 10 through "MCA" in line 11

6. Page 1, line 14.
Strike: section 1 in its entirety
Renumber: all subsequent sections

7. Page 3, lines 9 through 14.
Following: "future, the"
Strike: the remainder of line 9 and lines 10 through 14 in their entirety
Renumber: all subsequent subsections

8. Page 3, line 16.
Strike: "(4)"
Insert: "(3)"

9. Page 3, lines 16 through 18.
Strike: "court" in line 16 and lines 17 and 18 in their entirety
Insert: "county attorney shall petition the court in the manner provided in chapter 20 or 21 of Title 53, whichever is appropriate, to determine the disposition of the defendant pursuant to those provisions."

10. Page 4, line 4.
Strike: section 3 in its entirety
Renumber: all subsequent sections

11. Page 6, line 18.
Strike: section 5 in its entirety

And, as so amended,

DO PASS

JEAN A. TURNAGE, Chairman.

STATE PUB. CO.
Helena, Mont.